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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 420

NATHAN A. DOBBINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 276–281) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1946 (R. 282), and a petition for rehearing was denied July 22, 1946 (R. 283). The petition for a writ of certiorari was filed August 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, in order to establish the offense of embezzlement, the Government must show that a demand had been made for the return of the funds entrusted to the defendant.

2. Whether the trial court erred in failing to direct a verdict for petitioner after the prosecuting attorney's opening statement, because he had not stated specifically that the taking or conversion was done with wrongful or fraudulent intention.

3. Whether the trial court erred in not requiring the Government to elect at the outset of the trial whether it would proceed on the embezzlement, larceny after trust, or false pretenses counts of the indictment.

4. Whether the trial court erred in the admission of testimony.

5. Whether the trial court erred in its instructions to the jury.

STATUTES INVOLVED

Section 22–1202 of the District of Columbia Code (1940) provides:

> If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated

company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for not more than ten years, or both: *Provided, however,* That where the thing, evidence of debt, property, proceeds, or profits be of the value of not more than thirty-five dollars, the punishment shall be by imprisonment for not more than one year or a fine of not more than five hundred dollars, or both.

Section 14–307 of the District of Columbia Code (1940) provides:

> In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage.

STATEMENT

On December 20, 1944, petitioner was indicted in the District Court for the District of Columbia

on 69 counts charging embezzlement, larceny after trust, and false pretenses (R. 4–7).[1]

At the close of the opening statement by the attorney for the Government (R. 14–17), petitioner moved for a directed verdict on the ground that even if everything there stated were proved, the offenses charged in the indictment would not be established, since it was not asserted that any demand had been made upon petitioner for the return of the funds that had been entrusted to him (R. 17–18). The motion was overruled (R. 18), and at the same time the court overruled petitioner's motion to require the Government to elect at that time whether it would proceed on the embezzlement, false pretenses, or larceny after trust counts (R. 18–19). At the conclusion of the Government's case, on petitioner's motion and with the consent of the Government, the counts charging false pretenses and larceny after trust were stricken (R. 9, 95–96). Petitioner was found guilty on all 23 embezzlement counts (R. 10), and he was sentenced generally to imprisonment for a period of 4 to 15 months (R. 12). On appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed (R. 282).

[1] The indictment alleged 23 separate transactions, each of which was charged alternatively as embezzlement, larceny after trust, and false pretenses. The printed record before the Court contains only the first three counts, which are typical of all 69 counts (R. 4–7; see also R. 256–257).

The evidence in support of the Government's case may be summarized as follows:

Petitioner was attorney for one Josephine Butler, who was committee of the estate of her husband, William Butler, a lunatic (R. 24–25). In 1941, after the death of Josephine Butler, her daughter, Grace L. Jones, was appointed as substitute committee of the William Butler estate (R. 25–27). Petitioner continued as attorney for the committee of the estate, and acted as such at all times in question here (R. 25–28, 95–96). Between December 1941 and January 1944, certain monthly checks (Government retirement checks payable to William Butler) were received by Grace L. Jones as committee, and entrusted by her to petitioner as her attorney (R. 29–30, 32, 33–34, 95–96).[2] It was shown that petitioner

[2] At the close of the Government's cases the following colloquy occurred among the trial judge, petitioner's counsel (Messrs. Hayes and Cobb) and the prosecutor (Mr. Jenkins) (R. 95–96):

"The COURT. As to saving a little time, have you any theory on which you can go to the jury on false pretenses.

"Mr. JENKINS. No.

"The COURT. All right. A motion to strike, then, I suppose, those counts will be granted.

* * * * *

"Mr. HAYES. I think from our point of view the question of the actual receipt of the money, the testimony so far would be she indicated he was her attorney, and it was on that theory she turned it over to him.

"The COURT. And you didn't raise any question in your own case, or in your own argument he didn't receive that in that capacity.

led Mrs. Jones to believe that the checks were being deposited in a local bank in her name as committee of the estate (R. 30–32, 99, 221). Petitioner himself testified that when Mrs. Jones became committee and brought one of the first checks to him, he told her "that during her father's lifetime she had no right to spend any funds from his estate without an appropriate order of the Court," and "that I had planned to 'open an account in your name at the Industrial Bank * * *'" (R. 99). Mrs. Jones testified that petitioner "said in fact the check was to be deposited in the bank in my name as committee of the estate" (R. 30). In addition, the Government introduced into evidence annual reports of the committee of the estate to the office of the auditor of the district court which had been prepared in petitioner's office and purported to

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"Mr. HAYES. I think not.

"Mr. COBB. I think not.

"The COURT. We are all agreed on that.

"Mr. JENKINS. It would be inconsistent to the larceny counts if that is conceded.

"The COURT. That is what I am talking about. In other words, in view of the stipulation, have the only counts we have remaining in the case, the embezzlement counts.

"Mr. JENKINS. That is so, I think.

"The COURT. You make that motion in the light of that stipulation on your part that he received these moneys as attorney of the estate, see? In view of that, if you move to strike out all larceny after trust, I will grant the motion.

"Mr. HAYES. We do.

"The COURT. Then that is cleared up."

See also instructions to jury at R. 258–259.

show substantial deposits to the credit of Grace L. Jones, Committee, in a local bank (R. 36–37, 177–179). It was proved that there never had been such an account in this bank (R. 75). Petitioner denied responsibility for these false statements in the reports and attempted to place responsibility on his secretary (R. 108–109).[3] However, his secretary testified that this information was given to her by petitioner for insertion in the reports (R. 179). Instead of depositing the checks in a bank account for Grace L. Jones as committee of the estate, petitioner admittedly commingled them with his personal funds (R. 18, 19). Some of the checks were deposited in petitioner's personal bank account (R. 76, 84), which was thereafter depleted (R. 74), and others were cashed in liquor stores (R. 57, 58–60) and other commercial establishments (R. 61, 62).

[3] At one point, in answer to the question, "Who put down in this account the amount carried on deposit in the Industrial Bank of Washington, $1,868?", he answered, "It was partly through Mrs. Jones, and partly through me. I mean there was a mutual understanding between both of us as to that insertion in the account" (R. 132). However, Mrs. Jones testified that the reports were fully prepared when she went to petitioner's office and that she merely signed them (R. 69–70). At another point petitioner stated that everybody in his office knew that there was no such bank account (R. 137). He further testified that in the normal course of business his secretary would make up such reports from the files in his office, and said she must have gotten the data as to the bank account from the files, but admitted that for some reason he had not been able to find all of the records in the Grace Jones file (R. 130).

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The evidence further showed that during the period in which petitioner was commingling funds of the committee with his personal funds, his personal financial condition was seriously impaired. For example, it was shown that his personal checking account was overdrawn in December 1942 (R. 84) and insufficient in January 1944 to cover the amount then due the estate (R. 75). It was also shown that between 1940 and September 1944 petitioner repeatedly borrowed money from finance companies, banks, and personal acquaintances (R. 227, 242–243, 248, 255.) He obtained at least six loans on an automobile owned by him, the last for $2,074.50 in September 1944 (R. 245–247). He was not able to repay that loan, and the car was repossessed by the finance company (R. 247). After his indictment and arrest in December 1944 his family had to execute a mortgage on the estate of his father to raise the required $5,000 bond (R. 197–203). Shortly after his arrest petitioner stated to a police officer that his family was raising money to take care of his problems (R. 87).

In February 1944, petitioner was advised of the death of William Butler, which had occurred the preceding month (R. 110), and he then filed a petition to qualify Mrs. Jones as the administratrix of the estate (R. 110–111). At that time petitioner knew that he would have to make an accounting of the funds being held for the com-

mittee of the estate; he admitted that he was advised at the time, by a representative of the company which had previously bonded Mrs. Jones as committee, that there would be a hearing on the matter before the auditor (R. 111). Shortly thereafter, on March 30, 1944, the office of the auditor of the district court sent notices by registered mail to petitioner and Mrs. Jones of a hearing for the purpose of an accounting of the funds of the committee of the estate of William Butler, but the letter to petitioner was returned by the post office because he could not be found (R. 88–89). In October 1944, an investigator of the real estate commission was unable to locate petitioner (R. 90), and an investigator of the United States Attorney's office assigned to this case was unable to find him in the city prior to the grand jury proceedings in December 1944 (R. 92–93). Petitioner testified that from March to November 1944 he was at his office at least two or three times each week (R. 141), and that in the latter month he left Washington for his home in South Carolina (R. 114). He stated that he told his secretary and a Mr. Logan, with whom he shared offices, that he was going home, but admitted that he did not leave a specific forwarding address (R. 170). However, a police officer who contacted Mr. Logan in an attempt to locate petitioner prior to the grand jury proceedings testified that Mr. Logan told him he did not know where petitioner was

at that time (R. 93). And petitioner admitted that no mail was forwarded to him in South Carolina (R. 171). He testified that he had gone down to South Carolina to investigate the possibility of practicing there and that his intention to stay only a few weeks was upset by the fact that he became quite ill and was confined until early in January 1945 when he returned to Washington to answer the indictment (R. 114–115).

ARGUMENT

1. The principal contention urged here, as in the court below, is that embezzlement is not established, where no time is specified for the return of the funds entrusted, unless it is alleged and proved that there was a demand for the return of the funds and that the demand was not met. This was the sole basis of petitioner's motion for a directed verdict made at the close of the Government's opening statement (R. 17–18; see p. 4, *supra*), and it is the basis of petitioner's claims here that the court erred in denying that motion and in refusing to grant his requested instruction to that effect (Pet. 8–9, 22–28, 34–36). We think the court below was clearly correct in rejecting this view of the law (R. 279–280).

Embezzlement is established by proof that the funds came into the defendant's possession under circumstances which created a fiduciary relationship and that there was a breach of trust or

wrongful appropriation to the defendant's use. *Moore* v. *United States,* 160 U. S. 268, 269; *Weinhandler* v. *United States,* 20 F. 2d 359, 361 (C. C. A. 2), certiorari denied, 275 U. S. 554; *Hancey* v. *United States,* 108 F. 2d 835, 837–838 (C. C. A. 10); *Wilcox* v. *Commissioner of Internal Revenue,* 148 F. 2d 933, 934 (C. C. A. 9), affirmed February 5, 1946, No. 163, O. T. 1945. The crime is complete as soon as the wrongful appropriation occurs. *Wilcox* v. *Commissioner of Internal Revenue, supra;* Underhill's *Criminal Evidence* (4th Ed.) § 491, p. 1009. And the fact that restitution is made or intended does not absolve the wrongdoer. *Hancey* v. *United States, supra; Henry* v. *United States,* 273 Fed. 330, 339 (App. D. C.), certiorari denied, 257 U. S. 640; *State* v. *Baxter,* 89 Ohio St. 269. Thus, (a demand and refusal to pay are not elements of the offense, but merely constitute one type of evidence by which it might be proved, though it can be established without such evidence. *People* v. *Crane,* 34 Cal. App. 599, 610–611; *State* v. *Baxter, supra,* at 284–285; Underhill's *Criminal Evidence* (4th Ed.) § 493, p. 1010. The authorities cited by petitioner do not support his contention. 'To the contrary, in *State* v. *Reynolds,* 65 N. J. L. 424 (see Pet. 24–25), the conviction was upheld in the absence of proof of a demand, and the opinion specifically stated that "a demand is only one class of evidence for proving fraudulent conversion." 65 N. J. L. at

430. In *People* v. *Page,* 116 Cal. 386 (see Pet. 24), the decision was predicated on the absence of any evidence whatsoever of intent to convert. The reference in the opinion to the absence of a demand must be read together with an earlier reference, immediately preceding the portion of the opinion quoted in the petition, to the absence of other evidence "that the defendant ever spent, wasted, or appropriated to his own use any of the money of his ward." 116 Cal. at 395.[4]

There was ample evidence here that petitioner intended to and did fraudulently convert the funds of the committee to his own use. Thus it was shown that while he led Mrs. Jones to believe that he was depositing the funds in a bank account in the committee's name, he in fact immediately commingled them with his personal funds and used the money for personal purposes, knowing that, as he had advised Mrs. Jones, the committee funds could not be spent without court authority. It was also shown that throughout the period Mrs. Jones entrusted committee funds to him, petitioner was in poor financial condition, and that he was responsible for false reports to the auditor's office purporting to show that the com-

[4] The California decisions uniformly hold that proof of a demand is not essential to a conviction for embezzlement. See, e. g., *People* v. *Crane*, *supra; People* v. *Foss*, 7 Cal. 2d 669; *People* v. *Hill*, 2 Cal. App. 2d 141; *People v. Wiezel*, 39 Cal. App. 2d 657.

mittee's funds were secure in a local bank. These circumstances, coupled with petitioner's departure from Washington at the time the auditor's office was checking the accounts of the committee, were more than sufficient to establish a fraudulent and wrongful conversion. See Wharton's *Criminal Law* (11th ed., 1912), Vol. II, § 1300.

2. Petitioner also urges that the trial court erred in failing to direct a verdict for him at the close of the prosecuting attorney's opening statement, because it was not expressly stated therein that the conversion was with "wrongful" or "fraudulent" intent and, therefore, the charges in the opening statement, even if proved, would not establish the offense (Pet. 19–21). This contention would appear to be foreclosed in view of the fact that the motion was predicated exclusively on the ground that the offense could not be established unless a demand were alleged and proved (see R. 17–18).[5]

In any event, there is no merit in the contention. A motion for directed verdict normally cannot be directed to the sufficiency of the opening argument. See *McGuire* v. *United States*, 152 F. 2d 577, 580 (C. C. A. 8); *Rose* v. *United States*, 149 F. 2d 755, 758 (C. C. A. 9). The authority

[5] The record does not support petitioner's implication that the failure to state that petitioner had a "wrongful" or "fraudulent" intent was "called to the attention of the court and of the prosecutor" (see Pet. 21).

to direct a verdict upon the opening statement "should be exercised only when it clearly and affirmatively appears from the opening statement that the charge against the defendant cannot be sustained under any view of the evidence consistent with the statement." *McGuire* v. *United States, supra,* at 580. The opening statement here was not thus vulnerable. The fact that the prosecuting attorney did not employ the meticulous language of the indictment—and there is no complaint here that the indictment itself was insufficient—is of no moment since the statement in substance set forth *seriatem* acts which, if proved, would establish the offense of embezzlement (see R. 14–17), and the omission of the particular words "fraudulent" or "wrongful" did not in any way prejudice petitioner in making his defense. Moreover, even if the opening statement were to be tested by the same standards as are applicable to an indictment, it was sufficient. The prosecutor commenced and concluded the statement with the assertion that the Government would establish that petitioner had by the acts which the prosecutor recited committed the crime of embezzlement. This use of the word embezzlement itself implied fraudulent conduct by petitioner, and the addition of the words "fraudulent" or "wrongful" would not have enlarged or restricted its signification. *Grin* v. *Shine,* 187 U. S. 181, 189; *Weinhandler* v. *United States,* 20 F. 2d

359, 361 (C. C. A. 2), certiorari denied, 275 U. S. 554; *United States* v. *Mason*, 177 Fed. 552, 558 (C. C. D. Mass.), affirmed, 218 U. S. 517.

3. Petitioner argues that the trial court erred in not requiring the Government at the outset of the trial to elect to proceed on the embezzlement, false pretenses, or larceny after trust counts (Pet. 21–22). We think the court below gave a conclusive answer to this contention (R. 278):

> * * * we do not think the trial court erred in refusing the defendant's motion that the Government be required to elect to place its case on one of the three crimes charged before putting in evidence. This is a matter within the discretion of the trial court and its ruling was not an abuse of that power. As for any confusion which might have existed as a result of the prosecution being allowed to put in its case before making an election, we think it was well dispelled by the election at the end of the Government's case and by the instructions to the jury. There is nothing to indicate that the defense was in any way damaged by this ruling of the trial court.

As a matter of fact, the Government was in no position to make such an election until it could determine from the evidence the precise character of petitioner's relation to Mrs. Jones when he received the committee funds. It was only after the Government's case was in and petitioner

stipulated that he received the moneys as attorney for Mrs. Jones as committee of the estate (R. 19) that the Government was able to determine, as it then did, that it was necessary only to proceed on the embezzlement counts (see fn. 2, pp. 5–6, *supra*).

4. Petitioner argues that the testimony of his former wife relative to statements he made to her during their marriage as to his need for money should not have been admitted because the disclosures were confidential and, therefore, privileged (Pet. 28–31). However, the record does not show that petitioner objected to the admission of this testimony or that he claimed a privilege against permitting his former wife to testify as to these matters (see R. 227–231). Under such circumstances, the privilege, if any, must be deemed to have been waived. See *Steen* v. *First Nat'l Bank,* 298 Fed. 36, 41 (C. C. A. 8); *Proffitt* v. *United States,* 264 Fed. 299, 302–303 (C. C. A. 9); VIII Wigmore on *Evidence* (3d ed.) §§ 2242, 2340. Moreover, the testimony in question discloses on its face that the communications related only to petitioner's need for money, which he disclosed to his wife in order to induce her to borrow money from her mother and others on his behalf. Petitioner therefore contemplated that his disclosures would be passed on to third persons, so that they cannot be said to have been confidential. Cf. *Wolfle* v. *United States,* 291 U. S. 7; *Yoder* v. *United States,* 80 F. 2d 665, 668

(C. C. A. 10); *United States* v. *Mitchell,* 137 F. 2d 1006, 1009 (C. C. A. 2), certiorari denied, 321 U. S. 794; VIII Wigmore on *Evidence* (3d Ed.) § 2336. Hence, the communications were not within the privilege available under Section 14–307 of the District of Columbia Code (*supra,* p. 3).

Petitioner also objects to the admission of evidence as to his financial condition prior to and after the return of the indictment, but he refers specifically only to the testimony of one Nolan, an employee of a finance company, that the company repossessed his car when he failed to repay an outstanding loan; he states that "in truth and fact it was disclosed on cross examination the car was turned over to him [Nolan] after the indictment had been had and petitioner returned to the city without the slightest importunities or litigation" (Pet. 32–33). However, Nolan's testimony, both on direct and cross examination, was that the car was repossessed, not surrendered voluntarily, and that it was sold to satisfy the outstanding loan (R. 247). This testimony was but a part of the evidence showing petitioner's continuing financial disability throughout the entire period of his relations to the committee of the estate. Such evidence tended to establish that petitioner was in great need of money and that, therefore, there was both motive and intent for his embezzlement of the funds entrusted to

him. Its relevance was, therefore, obvious and its admission proper.

5. Petitioner contends (Pet. 14, 33–34) that the trial court was not warranted in instructing the jury that if they believed that he "was the attorney of Grace L. Jones, as committee of the estate of William Butler," and came into the possession of money belonging to the committee by virtue of such employment and that he wrongfully converted such money to his own use, they should find him guilty of embezzlement (see R. 260), because the evidence was uncontradicted that he did not come into possession of the money as attorney for Grace L. Jones, as committee, but that he accepted custody of the money purely as a favor and for safekeeping. While the evidence clearly supports the instruction (see pp. 5–6, *supra*) it is unnecessary to present a detailed analysis, since it was stipulated at the trial by counsel for petitioner that he received the funds as attorney for the committee of the estate (see fn. 2, pp. 5–6, *supra*; see also R. 19).

Petitioner also complains (Pet. 36–38) of the court's instruction that evidence indicating a flight from justice is admissible as evidence of consciousness of guilt, that it was for the jury to determine whether petitioner fled the jurisdiction to escape prosecution, and that they could "consider this along with other evidence in the case with respect to the alleged guilt of the defendant" (R. 264). Petitioner argues that while, as an abstract propo-

sition of law, this instruction may have been correct, there was not the slightest indication of flight in the evidence, so that the instruction was not justified. However, as we have shown in the Statement, *supra*, pp. 8–10, there was abundant evidence indicating that petitioner fled from the District of Columbia to avoid an accounting of the funds of the committee of the estate. Thus, the record shows that the auditor's office and the district attorney's office made numerous attempts to locate petitioner in connection with this investigation, that although petitioner claimed he was in the city and at his office frequently, they were not able to find him, and that petitioner did not leave the city until he learned of the forthcoming investigation by the auditor.

In this connection, petitioner quotes a part of the charge in which the judge referred to petitioner's explanation of his fugitivity and then stated that it was the duty of the jury to convict or acquit, depending upon "which version" it chose to believe (see R. 267–268). On the basis of this abstraction of a part of the charge from its context, petitioner makes the unwarranted argument that the court permitted the jury to convict or acquit solely on its determination whether petitioner fled from justice (Pet. 37–38). A reading of the entire charge, however, makes it apparent that the last two paragraphs of the quotation set forth in the petition, relating to the duty of the jury to convict or acquit depending

upon "which version" it accepted, was intended to apply and must have been understood by the jury as applying to the whole case, both for the prosecution and for the defense, which the court had reviewed and summarized in the instructions preceding that part relating to fugitivity. This is also apparent from the fact that in other parts of the charge the court stated that the evidence as to flight was to be considered "along with other evidence in the case" and that "The mere fact of flight does not in and of itself raise a presumption of guilt. It must be taken into consideration, if at all, by you in connection with the other facts in the case" (R. 264).

6. Finally, petitioner contends that the trial court erred in its handling of a communication received from a juror during the course of the trial and in refusing to declare a mistrial because of such communication (Pet. 38–41). Toward the close of the prosecution's case, one of the jurors sent a note to the judge asking for instructions on the following points of law (R. 143):

> * * * According to law can a juror find defendant not guilty solely on grounds that all money was refunded?
>
> "Is an employer (defendant) responsible for the acts of an employee (person or persons who collected checks and typing of statements)?
>
> "When lawyer draws up papers (whether fraudulent or not) and signed by someone

else, who assumes responsibility? (Signer is ignorant of law; so hires lawyer.)

Petitioner asserts that this inquiry shows that the juror was "biased, if not prejudiced, and had probably already made up his mind" (Pet. 39). We submit that the questions raised by the juror do not warrant petitioner's conclusion; they appear to be no more than an expression of the natural and reasonable inquisitiveness of a layman concerning the matter on trial. Counsel for petitioner agreed with the court, at the time counsel was advised of the communication and its contents, that the best course to follow was not to tell the jurors anything until all the evidence was in and then, with the aid of counsel, frame instructions on the points mentioned in the note (R. 143). We submit that the fact that petitioner's counsel delayed making the motion for mistrial until later in the trial (R. 168) indicates that he was not overly concerned about the note and that the motion was mere afterthought. In any event, a motion for a mistrial is addressed to the sound discretion of the trial court, and it cannot be said that there was an abuse of this discretion here. Cf. *United States* v. *Hirsch,* 74 F. 2d 215, 219 (C. C. A. 2), certiorari denied, 295 U. S. 739. We agree with the court below that the trial judge handled the matter judiciously by telling the jury immediately that he would instruct them fully after all the testimony was in and that it was improper for

them to ask for instructions as to certain points of law before that time (R. 143–144), and by subsequently giving the jury complete and proper instructions on all the questions involved in the case, including those raised in the juror's communication (see R. 266–267). For this latter reason, this Court's recent decision in *Bollenbach* v. *United States,* 326 U. S. 607, which petitioner attempts to invoke (Pet. 40–41), obviously is not apposite.

CONCLUSION

The decision below is correct, and presents no question of importance or conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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SEPTEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946